UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 PINEHURST LLC, et al., Plaintiffs,	**Docket#** 19-cv-06447-EK-RLM
- versus -	U.S. Courthouse Brooklyn, New York
STATE OF NEW YORK, et al., Defendants	June 23, 2020 2:00 PM

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE ERIC KOMITEE
UNITED STATES MAGISTRATE JUDGE

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THE CLERK: 74 Pinehurst, LLC, et al, v. State of New York, docket number 19-cv-6447.

Appearing on behalf of the plaintiffs, we have Kevin King. Mr. King, are you still on the line?

MR. KING: Yes, I am.

THE CLERK: Thank you.

Appearing on behalf of the State of New York, defendants, we have Michael Berg. Mr. Berg, are you still on the line?

MR. BERG: I'm on the line. Thank you.

THE CLERK: Thank you.

Appearing on behalf of the City of New York defendants, we have Rachel Moston. Ms. Moston, are you still on the line?

MS. MOSTON: Yes, I am. Thank you.

THE CLERK: Thank you.

And appearing on behalf of the intervenors, we have Michael Duke. Mr. Duke, are you still on the line?

MR. DUKE: I am.

THE CLERK: Thank you.

We are ready to start finally, Judge.

THE COURT: Okay. All right. So thank you everybody for your patience. We apologize for the

technical difficulties. I know that all the lawyers here today, as well as everybody listening in on the spectator line still have busy lives, despite the pandemic, and we're sorry to keep you waiting. You know, this is a somewhat more convoluted conference than usual in the sense that we have this dual-track with the speaker line, and the spectator line, but I think we're ready to go.

I will again give the standard disclaimers that because we are recording this, and it may be transcribed one day, I will ask the lawyers to try to avoid speaking over each other as much as possible, and when there is some give and take along those lines, to please state the name of the speaker each time you come on the line, so that somebody transcribing this later knows to whom they're listening.

I'll remind everybody listening, lawyers and spectators that the Court prohibits -- we are making a recording of this, and there will be a transcript, but the Court prohibits additional recording by the parties or the spectators, same as we would if we were in the courthouse in person.

Finally, I'll just add that because this case is, you know, and overlap in significant part with the CHIP case, which we call the Community Housing companion case, that we had oral argument in this morning. We have

a number of the same lawyers representing the same parties on the phone now.

You all can assume, obviously my familiarity with the arguments that were made this morning in respect of claims that overlap between this case and that case, and I would urge people to please target their arguments that are arguments for this case to the as applied challenges, and other claims that are not common between the two cases. Obviously, if somebody thinks that an argument was missed this morning, you should feel free to make it, but if the argument was adequately made this morning, you can assume that I'm as familiar with it for purposes of this case, as I was this morning, and as I indicated, I do intend most like, I would think, to issue one opinion, albeit with two judgments, for the two cases, given the number of overlapping issues.

And Mr. King, on behalf of your clients, you're the only ones not to weigh in on that subject this morning, please let me know if you have any qualms about that when it's your turn to speak.

But otherwise, we will kick this off again, with the defendants speaking first, given that it's their motion, especially given the fact that this case overlaps with this morning's argument, I would ask people to limit their arguments in the first instance to thirty minutes,

and then I'll give each side ten minutes for rebuttal with in each case, the defendants dividing their time among themselves, as they see fit.

So Mr. Berg, are we starting with you on behalf of the defendants?

MR. BERG: We have to -- this is Assistant Attorney General Michael Berg representing defendants, the State of New York, the New York Division of Housing and Community Renewal, and Commissioner RuthAnne Visnauskas in this civil action.

At the outset, your Honor, I think we need to clarify the scope of the complaint in this case because the complaint on its face challenges the rent stabilization law, a statute that's been on the books since 1969, and it specifically challenges a number of provisions of the RSL such as the requirement that landlords tender renewal leases, grant succession rights, limit the -- the provisions limiting evictions, and others that we identified in our reply brief, that have either been a part of the rent stabilization law from its inception, or have long pre-dated the 2019 amendment to the rent stabilization law.

Now in their opposition brief, plaintiffs stated that they were not asserting a challenge to a 50-year-old regime of rent stabilization, but only a nine-

month-old regime of rent stabilization. In other words, the enactment of June 14th, 2019.

If the relief plaintiffs are seeking is merely to turn back the statutory clock to last June 13th, then this is a very different case from the one that was plead in their complaint. They are not looking on that reading of it, of the complaint, they are not looking to totally uproot the rent stabilization system as it existed previously, and it's just not clear to me what they are seeking to challenge.

We have a feeling that the Court will know from our briefs, that because they are challenging many pre-existing provisions, that they are seeking to get rid of the whole system, but if that is not their position, we can have a different discussion and debate, and I don't know if the Court would want to clarify that now, or would just want to hear our arguments and proceed in the ordinary course to (indiscernible).

THE COURT: I think I'll weigh in with my understanding, and then when it comes time for the plaintiffs to speak, I'll let them at that point speak for themselves.

You know, my understanding was that the reason they walked through all of the provisions of the rent stabilization law, including not only the 2019

amendments, but everything that pre-dated it, is because they are making as I said this morning, a straw that breaks the proverbial camel's back argument whereby they're asking the Court to conclude that the 2019 amendments, together with everything that came before it, you know, finally gets us to the point that Justice Holmes hypothesized where regulation goes too far, and that the remedy they're seeking is to remove that last straw, not to remove all the straws going back to the beginning of the rent stabilization law itself.

But I may be wrong about that, I will leave you to make your argument, and we will hear from the plaintiffs at the conclusion of the defense motion.

MR. BERG: All right, Judge. Thank you, your Honor, and we'll proceed on that basis as well.

I am taking the Court's advice, I don't want to belabor the issue of the facial challenge to the rent stabilization law as amended as a physical taking. We continue to believe that that is a category error, and there is no physical taking in this case, and certainly not in all circumstances as applied to rent stabilized landlords.

With respect to the same theory, the physical taking theory, the plaintiffs purport to allege a separate, as applied challenge, but in fact they don't.

They simply copy their physical taking claim word for word and substitute the phrase "as applied to plaintiffs" for the phrase "on its face".

There is no allegation that the State defendants or any of the defendants have seized any of the plaintiffs' property, taken easements, or imposed a requirement as in Loretto (ph.), the physical structures be placed on the property, and for the reasons that we discussed this morning, merely telling a landlord who is in the business of renting apartments to members of the public, that it must tender a renewal lease, and can only evict the tenant for certain violations of the lease, is a regulation of the economic relationship. It is not a physical taking.

Finally on this point, there is not -- in the complaint, it is not alleged that a single plaintiff wants to exit the business of leasing apartments to tenants. So once again, we have a situation where nobody is being forced to -- by the government to lease units to tenants, they're only being compelled by law to comply with regulations adopted by the legislature in the public interest.

In terms of the regulatory taking claim, there are -- again the arguments for (indiscernible) the facial challenge are the same as those we discussed this

morning. There's no allegation that on its face, the statute deprives property owners of the economic viability of their buildings.

Plaintiffs in the complaint, do make a somewhat cursory effort as to identify specific circumstances that could support an applied challenge, with respect to certain apartments. So for example -- and certain buildings. So for example, 74 Pinehurst and 141 Wadsworth allege that they lost 20 to 40 percent of their value and it was from paragraph 234 of the complaint, "jeopardizing the ability of these plaintiffs to refinance their mortgages in the future."

That appears to indicate there's no allegation of any actual obstacle to the entities attempting to refinance, nor is there an allegation that they had actually attempted or were about to attempt refinance. So the specific allegations that are pled in this complaint, as I say, are cursory, and don't really get them to a well-pled claim as a regulatory taking as applied to each plaintiff.

When you --

(Cross-talk)

THE COURT: Well, the Panagoulias, if I am pronouncing their name right, I mean, the Panagoulias plaintiffs plead that they sought to take an apartment

for personal use out of rent stabilization in one of their buildings, and that that application was denied because the personal -- the apartment they were seeking for personal use was a two-bedroom, and the Board decided that if they really needed an apartment for personal use, they should've acted years earlier to take a one-bedroom that had been available previously. How do you overcome an allegation like that at the motion to dismiss stage?

MR. BERG: Well, they are -- so what we do is we go through -- in an instance where there is a specific allegation like that, we accept the specific facts, but not the legal conclusions, and we go to the Penn Central analysis, and we look at the nature of the government's action. Plaintiffs argued, for example, that the government's actions in a physical invasion of their property, and for all the reasons that we briefed in the context of physical taking, is not.

Plaintiffs also assert that this is a -- that the rent stabilization law asks the individual plaintiffs, in this instance, the Panagoulias family, to bear a burden that should be born by the public as a whole, but in fact, as the courts have held in prior cases, rent stabilization is a broad-based economic regulation. It doesn't single out anyone. It subjects the owners of close to a million apartments in New York

City, to a regulatory scheme.

And so, you know, for example, we have the -- we cite the Jaydo Associates case where the question is whether the RSL amounts to a physical invasion or merely affects property interests through some public program adjusting benefits and burdens of economic rights to promote the common good.

We think there's no -- there has been -- on that issue, the first prong of the Penn Central test, all of the case law supports the validity of the goals of rent stabilization, and supports that the nature of the program is broad based, it's a program in the public good, it affects economic -- the economic rights of landlords and tenants, and is not calculated to single out any individual property owner, nor does it affect the physical occupation of their property.

We would then turn to the degree of economic impact and that --

THE COURT: So what we talked this morning about -- can you hear me?

MR. BERG: Yes.

THE COURT: Okay. Sorry. What we talked this morning about Yee a bit, and the question of whether -- you know, the plaintiffs in Yee allege look, we've essentially been excluded from our own property in

perpetuity because we have to take the tenant who is there, and not only them, but any of their successors, people that they would pass the property to through inheritance, or sell the property to and get no choice in the matter, and you know, that permanent exclusion is a physical taking. And the Supreme Court said no, it's not, and one way we know that is because there's these off-ramps in the statute that say that you can get out of the business of renting property in certain ways, and you can take your property back and use it for other purposes, at least on the face of the statute.

You know, here we've got an as applied challenge where they're saying something I think almost identical to what the plaintiffs in Yee had to say but in the context of an as applied challenge, and they're alleging look, you're telling me one of the off-ramps to rent stabilization that renders it not a permanent, physical occupation forever, is that I'm supposed to be able to take one apartment back for personal use, and yet we applied to do that, and the New York State Board denied our application for reasons that made no sense.

So I mean, don't we have to have discovery then on that issue to assess the validity of their claim that the off-ramp is illusory?

MR. BERG: No, your Honor. We accept them at

their word that the -- that in that particular circumstance, the application was denied. If we're talking about the physical challenge here, and the application of Yee, the -- there's no need for discovery because there is no allegation of any physical occupation or encroachment on owners' property full stop. And I understand the allegations about that -- (indiscernible) Panagoulias family to sound more in (indiscernible) in whether there's been regulatory taking or not.

In terms of Yee, we would argue that on the face of that decision, there's -- just as there were off-ramps there, and there remain off-ramps here, and the owner does not have to -- the owner -- as long as it becomes constitutionally suspect, in particular circumstances, the owner applied for an off-ramp and was denied. I don't know whether that determination was appealed. There was no allegations that an Article 78 proceeding was brought to challenge that determination, but a remedy for that is that does not sound in physical taking, and we don't believe it states a regulatory taking.

And I don't believe that the Yee analysis is really germane to the point of a regulatory taking. I'd also point out that the Court doesn't have to take the State's word for it because in a number of prior cases

which we cite, it including Harmon and 95 West, the Second Circuit had cited Yee specifically, and relied on Yee, to hold that there was no physical taking. So I think no matter how you slice it, there is no as applied in claim, and as I recognized at the outset, the plaintiffs do make somewhat more than attempts, a fairly thin one on the face of the complaint, to identify circumstances where one or another plaintiff had a regulatory impact that went too far.

And we go through the -- again, a full Penn Central analysis in our brief. It sounds as if it may not be the most useful thing to replicate that here, but what I'm essentially saying is that the plaintiffs don't even get to square one on an as applied physical taking claim, it's just not there. It's not something that's validly pled in the complaint.

They do need to make more of an effort, and they need to take seriously, the allegations that in a couple of circumstances there were regulatory takings as applied to individual plaintiffs, but we believe it failed to state that claim for a variety of reasons, but including when you look at the nature of the government's action, and the extent of the alleged economic impact, and I'll give the Court one example (indiscernible) if there's a question, then I'll move onto contract claim

but they are related.

THE COURT: Let me just stick with Yee. Before you move on, can I just stick with Yee for one second.

MR. BERG: Sure.

THE COURT: So the petitioners in Yee were making the argument that the rent controlled ordinance in California, transferred the discrete interest in land, namely the right to occupy the land indefinitely at a submarket rent from the owner to the renter. And the Supreme -- and this is a physical taking of the claim. And the Supreme Court said we know that's not true because the residency law there provides that a park owner who wishes to change the use of his land can evict the tenants, albeit with six or twelve months notice for the purpose of changing the use of the land.

And the petitioners came back and said yes, you know, Supreme Court, that off-ramp about changing the use of the land exists in theory but in practice, it doesn't -- you have to run a kind of gauntlet, they said in order to avail yourself of that off-ramp.

And the conclusion from the Supreme Court is look, a different case would be presented were the statute on its face, or as applied to compel a landowner, over objection to rent his property or to refrain in perpetuity from terminating a tenancy.

Just tell me again, sort of why isn't this that very different case that Justice O'Connor hypothesized where it is an as applied challenge, and the plaintiffs are actually saying look, I did seek to avail myself of that off-ramp, and my request was denied.

MR. BERG: Well, there are number of off-ramps here. There are a number of means of exiting rent stabilization, and --

THE COURT: So then -- sorry to interrupt you but is it your contention then that in order to even get past the motion to dismiss, in the as applied context, a plaintiff has to try to avail him or herself of every single potential off-ramp in sequence, and fail on every score before they can survive the motion to dismiss?

MR. BERG: No, your Honor. What we're saying is that by making -- if an owner makes an effort to run the gauntlet and is denied, they have an Article 78 claim made in -- and it could be conceivable that in some instance where there's totally irrational denial of -- or an equal protection violation, because the denial was based on protective class or something like that, then they might have a constitutional claim.

But I don't believe they have a due process or taking claim, because in a particular case, they were denied the opportunity to cease renting a particular

unit. I think that's what Yee stands for and Yee has been cited, and a good discussion of it is in the Greystone Hotel case, in the Southern District which was affirmed on the Second Circuit, basically explaining the difficulties of exiting the rent controlled regime in Yee, and holding that it was comparable -- that because those options existed, and because they exist as well under the rent stabilization law, that the -- that there was no taking under the RSL.

So I think they're -- I think Yee controls here, and I think the Second Circuit has repeatedly reached the same conclusion.

And the only point I was going to make about 74 Pinehurst is that -- and I understand that they raised it, and we'll discuss it as well in the context of contract clause claim, but they -- two of their apartments were -- was denied -- they were denied the opportunity to revoke preferential rents in two of the 27 units that they own.

Under regulatory takings analysis, that is not substantial, nor as we argue in our briefs, was it unforeseeable, and even if one could state a claim that it was unforeseeable, and substantial, which we contend they have not, we still think that the nature of the government regulation being the broad-based economic

regulation, adjust to (indiscernible) benefit the economic laws is enough to defeat, and mandate a dismissal of their as-applied regulatory takings claim.

THE COURT: What about the MCI and IAI (ph.) claims where they say look, we've made repairs and capital improvements under the prior regime, expecting to be reimbursed in accordance with that regime, and then while our applications were pending, the new 2019 regime comes into play, and is applied essentially retroactively, to repairs completed before, where applications are still pending. How is that foreseeable?

MR. BERG: Well, the provisions governing MCI and IAI's costs, and the costs that could be passed along to tenants, have been revised over the years, as have many of the other formulas for either enhancing or reducing landlords rents or other add-ons that landlords are entitled to collect.

These are --

THE COURT: Have they previously been amended in ways that applied retroactively though?

MR. BERG: I don't know that offhand, your Honor. The -- there have been changes to the regulatory regime over time, that have affected ongoing tenancies. So for example, a tenant who entered into a lease in the late '80s, on the assumption that upon -- on the

assumption that that rent stabilized apartment was going to remain rent stabilized for the duration of the tenancy, would've been very surprised in the early '90s to find that they had such a thing as vacancy, decontrol, and high rent decontrol being in place by the legislature.

Now I don't want to characterize that as retroactive. I don't think it is. I think it is forward looking, in the same way that I think these provisions that we've been talking about, for example, MCI and IAI's, are not being applied retroactively, were being applied to applications that are still pending, or that are filed after the effective date of the statute, but I take your Honor's point that they do have an affect to people who are already engaged in transactions, whether it's tenants with leases or landlords with improvements.

Again, we don't think it's retroactive, but I understand the concern there, and there have been changes in the past that have affected ongoing leasehold relationships, and so do these changes.

THE COURT: Okay.

MR. BERG: Just briefly on the contract clause claims, in our brief, we gave plaintiffs credit for carefully avoiding any claim that the RSL or that the 2019 amendments affected future contracts because it is

black letter law that over the contract clause, there's no such thing as State interference with a future contract.

State law is presumed to be the background law that governs contracts that are entered into when that law is on the books, and to their credit, plaintiffs challenged in the complaint, or at least challenged specifically, only two apartments, two apartments owned by 74 Pinehurst where the lease was renewed prior to the effective date of the statute, and 74 Pinehurst complained that it cannot revoke those preferential rents, upon renewal.

That's how narrowly we understood them to plead their claim. In their brief, they argued that there was a broader claim which had to do with leases that existed as of last June 13th, but that were renewed subsequently and in the future, based on terms governed by the new statute.

Again, you know, we may have given them too much credit if that is part of what they are alleging, that is just not a cognizable claim under the contract clause because those lease renewals are subsequent to the enactment of the statute, and have -- and are governed by the State law that is in effect at the time of the renewal.

With respect to --

THE COURT: At the time of the --

(Cross-talk)

THE COURT: Isn't -- can we just stick to that point for a second?

MR. BERG: Yes.

THE COURT: The contract is made and binding before the statute goes into effect. It just calls for performance in the future, right? But it's a binding contract by the time it's inked by both sides, not necessarily at the time --

MR. BERG: What I am --

(Cross-talk)

THE COURT: Am I wrong about that?

MR. BERG: -- what I am -- well, I may have been a bit opaque. I'm sorry, your Honor. With respect to the two apartments, that 74 Pinehurst is complaining about, that indeed was a -- I believe that those were indeed leases between 74 Pinehurst and two tenants of record that were signed prior to June 14th, 2019, and that gets them to the starting line. That gets them to -- 74 Pinehurst to a point where we will say yes, let's engage with the merits of your claim, and see whether they state a claim under the applicable pleading standards, and the substance of law of the contract

clause.

What I was referring to separately, or trying to, was their purported broader contract clause claim where they say well, we now -- we have all sorts of other apartments, and those apartments will come up for renewal one day, and when those apartments come up for renewal, the renewal will be governed by the HSTPA, the 2019 amendments.

And there, that --

THE COURT: Wait, that I understand.

MR. BERG: -- is not even a contract clause claim but you're right, they do -- looking back to those two leases, we do have to engage, and we do engage in our brief, in a more substantive and deeper analysis, which basically has two prongs; one is whether the impairments, alleged impairment was substantial, and we submit that because it was only two out of 27 apartments, and also because the changes were foreseeable, that there -- that there was no substantial impairment of the owner's rights, and in this regard, it's worth noting that from 1969 to 2003, the rent stabilization laws did not permit an owner to revoke preferential rents during a particular individual's tenancy.

So this is something that was on the books from 2003 to 2018 -- '19 rather, the legislature being that

the type of sudden, abrupt, and quite costly increase that could be imposed as a result of this provision, was addressed with tenants, addressed to the goals of the rent stabilization law, and this is an aside, that in enacting the 2019 legislation, the legislature did not just say there's still a housing crisis in New York, they said there's still a housing crisis, and existing laws threatens to exacerbate it, so we will change the existing law.

So in furtherance of that goal, we -- the legislature revoked this provision on -- sorry, renewed the provision, that allowed landlords to revoke preferential rents upon renewal.

THE COURT: Okay. Let's turn to the City --

MR. BERG: But the (indiscernible).

THE COURT: Let's turn to the City at this point.

MR. BERG: Well, just briefly the last point on that, your Honor, is that even -- the plaintiffs have yet another hurdle because even if the Court were to find that a claim would arguably state -- not a claim, but that element would arguably claim they would still have to -- plaintiffs would still have to show that it was not a valid exercise of the police power, and -- I'm sorry, that there was not a valid public purpose and an

appropriate means and we brief -- it's written in our briefs that they changed this (indiscernible). Okay. And with that, thank you for your time, your Honor.

THE COURT: Okay. Thank you. Let's turn to the City.

(Audio recording at 0:54:00 becomes increasingly distorted)

MS. MOSTON: Yes, this is Rachel Moston for the City defendants.

I'm just going to make a few points, and try not to repeat any of the ground we've covered, as argued by Mr. Berg.

In terms of the as applied claim, as your Honor pointed out, I think the only factual -- one of the only factual arguments is that (indiscernible) complaint regarding the (indiscernible) and the fact that your Honor (indiscernible). In all of our (indiscernible) I think all of the (indiscernible) and the claim that that's (indiscernible) time barred to the extent that it's seeking relief on that claim, and certainly that eight-year-old action pre-dates the HSPA restrictions which went into effect in 2018, as we all know.

In our opposition papers, the plaintiffs addressed everyone's claims as time barred, and actually said they're not seeking a relief of denial of this

application (indiscernible). So it's not -- they're not only seeking the relief for the (indiscernible) this building (indiscernible) the case law because it couldn't make this mandatory showing. There are plenty of other exit options for him under the RSL, and they remain in effect today --

THE COURT: Well, let me just (indiscernible) to you that --

MS. MOSTON: -- (indiscernible). Sure.

THE COURT: So I agree, he's not saying he's entitled to damages for the failure of the State to grant (indiscernible) for that apartment. He's saying look when I say (indiscernible) the apartments, in the sense that I have excluded from the benefit of the tenancy and the right to stay in perpetuity, the State did not (indiscernible) granted when it retorts to that, that look, look, there are these other off-ramps because I allege that the off-ramps are illusory, and here's some evidence to that effect, right?

And that evidence is not time-barred, his claims are time-barred. So you know, why -- why shouldn't that then count towards his as-applied challenge together with all of the additional facts of the Panagoulias family, and when we do ultimately a question -- you know, why shouldn't we credit that

allegation that the off-ramp is illusory, as he alleges, for purposes of the deciding whether he survives the motion to dismiss, not whether he wins -- whether he survives the motion to dismiss on his as-applied claim?

MS. MOSTON: Well, first of all, the off-ramps aren't illusory. He doesn't make that many other factual allegations. The only other allegation I believe he makes is that Maria Pangoulias has considered occupying a rent-stabilized unit in her family's building.

So it's not like we have a factual record here for the Panagoulias family. We have these sort of (indiscernible) claims -- and I just want to clarify (indiscernible) apartments were used (indiscernible) because we know that Mr. Panagoulias can get another two-bedroom apartment theoretically when that tenant vacates the unit.

Certainly that (indiscernible) --

THE COURT: Let me (indiscernible) --

MS. MOSTON: -- you can't --

THE COURT: Let me just jump in there for a second.

MS. MOSTON: Yes, sure, sure.

THE COURT: But the decision to deny his first application for personal use of a two-bedroom, that there once was a one-bedroom that was available, and he didn't

apply for personal use of that, then why wouldn't it also be that -- wouldn't that reasoning also be sufficient to deny his next application for a personal use exception.

MS. MOSTON: He can get a unit -- sorry, your Honor. He can get a unit upon vacancy. This personal use exception only applies when somebody's been living there that you're going to evict from their home. It's disruptive and you're taking a rent stabilized unit -- you're kicking a rent stabilized tenant out of their home mid-tenancy, and the law --

THE COURT: (Indiscernible) vacancy of a non-stabilized apartment. Can he do that?

MS. MOSTON: We are not able (indiscernible).

THE COURT: That's --

MS. MOSTON: Yes, even a (indiscernible) apartment. It's about New York State (indiscernible) in our papers, it's a time vacancy, for (indiscernible) a single use, that's mid-tenancy, if you're actually evicting somebody who (indiscernible) for your personal use, but if that unit becomes vacant, and the tenant leaves at the end of their tenancy, you can reclaim that unit. You don't have to (indiscernible) there. It's only a mid-tenancy.

THE COURT: Understood. Yeah, understood.

MS. MOSTON: Okay, so the other issue I just

want to address that we bring up in our papers that we didn't address yet, that is this issue of alikeness.

So when we're talking about as-applied regulatory takings challenges, applied cases in the past like Harmon and Greystone posed challenges just like this because they said you didn't exhaust the DHCR. You didn't try to get hardship. How are we supposed to know how far this regulation goes with respect to your property if you could potentially get a hardship, if you could get some monetary relief from that. It's our position that line of reasoning still applies to regulatory taking claims for as-applied challenges.

(Indiscernible) the Court, Harmon and Greystone were decided, there was the Knicks case, a Supreme Court case, that did overturn a prong of the Williamson (ph.) doctrine that basically says not only do you have to exhaust by going to the DHCR, or going to an agency to get a variance, but you're supposed to go to state court to try to get just compensation before you could even come to federal court to bring your as-applied regulatory takings claim.

And the Circuit has since then said that even though the state court just compensation prong was overturned by the Knicks case, that you still do have to go to try to exhaust your administrative remedies, so

that you can really assess how far this statute goes with respect to your property.

So I just wanted to make that point, that arguably these regulatory takings claims are (indiscernible), that they have to exhaust their hardship, so we could even plead.

They're claiming that this is so egregious with respect to their property. Well, maybe we could find out their options for relief and damages (indiscernible). And so that's the bottom line. The case law is that the guiding principle here in this Circuit is that mere diminution value, no matter how serious, is insufficient to consider regulatory takings as a matter of law.

Owners of rent stabilized buildings are not entitled to profit as they would under a market-based system, so all of these claims, even if we accept them as true, we don't need discovery on it (indiscernible) that they are aggrieved. That's what they're claiming, their property is devalued 20-40 percent. Even if we take that on its face, even if we see that as true, as a matter of law, that is not a constitutional challenge.

Their complaint is about the MCIs and the IAI calculations, is really just goes to what is the actual harm that you are pleading under this statute, how far does this regulation go, and at the end of the day it's

our position that plaintiffs here are not really that far and that their regulatory takings claims as a matter of law fail and I think that that's it. I don't have anything further, unless the Court has questions.

THE COURT: I'm sorry, everyone. Thank you very much.

Mr. Duke? We'll go briefly to you, and then over to the plaintiff.

MR. DUKE: Thank you, your Honor. Yes, just very briefly. I want to make one point with respect to the Panagoulias allegations. One thing that hasn't come up yet is that four out of ten units are not rent stabilized. There's nothing that prevents plaintiff Panagoulias or any of the (indiscernible) taking those units over, and as Yee makes clear, a landowner is not entitled to say I want this type of tenant, and not that type of tenant. They cannot choose amongst different ones.

They're also not entitled to any unit they want. That's made clear in the record in the (indiscernible) case, which says all of the (indiscernible) free (indiscernible) property exists (indiscernible) standing (indiscernible), essential and explicitly permissive.

Requests (indiscernible) in the occupancy, and

there are numerous off-ramps to allow them to do so. And as Ms. Moston stated, they can't occupy any of the units, including the rent regulated ones, if the end of the vacancy, they cannot evict the tenants from the very beginning of the RSL, since they've had (indiscernible).

And another point that I'd like to make, your Honor, is that MCI still allowed full coverage over a longer period of time. Taking of the rent is not a physical taking, because it is not the functional equivalent of direct appropriation or of ouster.

All that's happening, there's slight reduction in the legal maximum amount of the rent that is not necessarily the rent charged to any tenant.

And then last, your Honor, I would just direct the Court with respect to the contract clause claims to (indiscernible) which is (indiscernible) to the (indiscernible) case is directly on point with respect to (indiscernible) claim. In that case, the Supreme Court held that new regulations, which imposed a price cap on natural gas, where a state price had not previously existed, did not substantially impair an existing contract to provide for a higher payment, and allow them to remove regulations, and how heavily-regulated that industry was in general.

And the exact same thing is true here. This is

an extremely competitive, heavily-regulated industry. (indiscernible). The Second Circuit made that clear in (indiscernible) Trust in (indiscernible), and these languages could not have expected that the (indiscernible) remain static and not be rolled back to a prior iteration of any preferential (indiscernible) from 2003.

As far as (indiscernible), your Honor, if you have any further questions, I'm happy to answer them. Otherwise, we believe for these reasons and for the reasons stated in our briefing, that plaintiffs' claims should be dismissed.

THE COURT: Thank you.

All right, let's turn to the plaintiffs. I think it's Mr. King.

MR. KING: It is, your Honor. May it please the Court, Kevin King from Covington & Burling for plaintiffs.

Good afternoon.

THE COURT: Good afternoon.

MR. KING: I have listened in on everything to date, so I will do my best to tailor my argument as you instructed at the outset. There are a few issues where we have overlapping claims with the CHIP plaintiffs and where we view the issues, just a little bit differently

in terms of emphasis, I will develop those briefly and then turn to the things that make our case different and unique, if I may.

THE COURT: Sure.

MR. KING: So at a high level, from our perspective, the defendants are dodging key issues in three important ways, and the motion to dismiss fails as a result.

First off, they overlook changes in the 2019 amendments, that the amendments sponsors and indeed, that New York's highest court has acknowledged are sweeping and unprecedented.

Defendants' arguments are focused on the law prior to the RSL, but no court has addressed this law, which burdens property rights in a way that fundamentally alters the analysis, including by making it impossible for plaintiffs to exercise their rights to possess, use, and exclude others from their property.

We'll get into it later. Those changes are the changes that your Honor used the terms, "are the straw that broke the camel's back", and so I'll begin with that in just a minute, but before I do so, the arguments that defendants are dodging, the second one is that they engage generally in an improper divide-and-conquer approach.

They look in trying to address each of the challenges we pose in isolation, whereas our point is that the combined effect of all of these restrictions and requirements results in a constitutional violation. And there's Supreme Court precedent repeatedly requiring that kind of (indiscernible) analysis.

Third, and finally, I just want to emphasize that we're here at an early stage of the case, on motions to dismiss, and so the issue whether our allegations state a claim, the defendants in their arguments and brief, repeatedly bypass that standard, for example, by bringing in external facts, or arguing the merits of our claims, rather than addressing whether we state a plausible claim. There is a low bar in considering defendants' motions.

THE COURT: What facts are in dispute?

MR. KING: Yeah, sure, so there are a lot of facts that are in dispute here, but let me just go through a few of them. One of the facts in dispute is the due process claim, and it's whether, in fact, the RSL that happened in 2019 achieves the objectives that defendants say it does. The defendants argue that it does advance those objectives, and we argue that it does not. And not only do we argue that, we put in significant documentary evidence indicating that it does

not. So that's one area.

But in another area --

THE COURT: So on that particular question, something that came in this morning, and I'm sure that you listening in this morning, you know, the hypothetical I put to plaintiffs' counsel, what if the Court were to conclude that there is a legitimate issue, legitimate dispute of fact, with respect to one articulated legislative purpose.

MR. KING: Right.

THE COURT: For example, you know, increasing vacancy rates, and you contend profiteering, and collection, but that there doesn't seem to be a reasonable dispute as to another articulated jurisdiction, such as for example, the goal of neighborhood stabilization, and keeping, you know, certain low and moderate income people in a continuous way in neighborhoods they would otherwise have to leave, as a result of rents increasing faster than they can keep up with.

Do you also agree that (indiscernible) factual dispute on one articulated jurisdiction justification?

MR. KING: I mean, the test -- it depends on what level of scrutiny would apply, your Honor. You know, we argue for heightened scrutiny on the due process

issue because fundamentally property rights at issue here. The defendants, in order to use a rational basis approach, defendants need to show that the law is rational overall. And it's true that one of the ways they can do that is they say their interest that we've asserted is a valid interest, and I'll come back to the validity issue in just a minute, and this law advances that -- requires evidence.

We allege that there is absolutely no evidence to establish that it does, and they say no, no we have evidence that it does, and that's the kind of thing the defendants can make a record of and come back at summary judgment, but just to come back to the validity of the interest, the defendants today for the first time referred to the Nordlinger case from the Supreme Court. That case, as far as I understand, was not cited in any of the defendants' briefs in the case, so rather than dwell on it here and now, your Honor, I would request permission to expand the scope of the supplemental briefing by two or three pages, and give us an opportunity to respond on that point.

THE COURT: So if as you're saying they invoke the Nordlinger case for the proposition that neighborhood stability and continuity is valid justification for rent stabilization laws, and it was, if I understand

correctly, this morning it wasn't just Nordlinger that they were citing for that proposition. I think it was the federal home loan mortgage -- I forget the acronym here but the FHML case, and others, and that we -- if it's your contention that no case other than Nordlinger supports that, then it's only (indiscernible).

MR. KING: Well, your Honor, I believe if I heard correctly this morning, that the Federal Home Loan case said that Mr. Berg (indiscernible) is from state court. I'm not one hundred percent sure on that, but that's what my notes indicate. And so that of course would not show that federal courts acknowledge this is a valid interest.

THE COURT: (indiscernible) the Second Circuit, I'm just going to read. There's a legitimacy interest in the RSL, in coping with an acute shortage -- what I'm looking for -- the FHL said that one valid justification for these clauses (indiscernible) slash lack of stable housing. Is that also the same (indiscernible) reflected in Nordlinger?

MR. KING: Well, I think that Nordlinger is a tax case that dealt with diversity and (indiscernible), so there may be differences here, there may not be. It maybe we have to concede the point that we have not had the chance to evaluate Nordlinger in full.

THE COURT: Okay. (indiscernible) in the supplemental letter is fine.

MR. KING: We can do that.

THE COURT: That would be helpful.

MR. KING: So, coming back you asked the question of the fact disputes. Let me just tick through a couple of the other ones they have here. (indiscernible) the denominator question for the Penn Central analysis, and that question is extremely important because the property as issue often has great significance because of the outcome. Our allegation here is that the property for Penn Central purposes, is the individual unit. The Defendants of course take a different view. And so how do you decide that? Well, one of the inputs to that, the Supreme Court tells us, in Murr versus Wisconsin, are the reasonable expectations of property ownership, and the way you determine reasonable expectations of property ownership is to solicit expert testimony, you conduct surveys, you take discovery of government regulators to look at how they approach whether apartments are separate parcels from one another, right? Those facts are not under plaintiffs' control, that goes to the denominator issue.

THE COURT: So, a legal question. So I agree with you that first off, the numerator and denominator

issue I think right because we have to compare apples to apples, and it is tremendously important whether you're looking at this on a rent stabilized apartment level versus a building to building level.

Just if I could put two questions to you on that, one is that of logic, is (indiscernible) undisputedly the case that your client is making investment decisions at a building level, rather than -- you know, they don't have the option to do that, rent stabilized apartment by rent stabilized apartment, when you're talking about diminution in value, and interference with your investment-backed expectations, just I don't see how it makes sense, to say that we should look at that at the level of the individual apartment.

And two, from a legal perspective, you have the language in Penn Central itself that straddles pages 130 to 131, that says taking jurisprudence (indiscernible) into discrete segments, and to determine whether a particular segment had been abrogated, and in deciding whether a particular government action has affected a taking, this Court, and the Supreme Court focuses on the nature and extent of interference (indiscernible) in the parcel as a whole.

So how can that be as a legal matter, anything

other than the building in which your client is invested?

MR. KING: The question then becomes, your Honor, what is the parcel as a whole, and we can put in evidence at the summary judgment (indiscernible) Murr factors, which I agree that they concluded are (indiscernible) of law, but the (indiscernible) between the law, and as a matter of fact, treats each individual apartment separately, and (indiscernible) a building, (indiscernible) --

THE COURT: Why separately, right? Why is that?

MR. KING: Your Honor, we can cover this in our supplemental briefing, but from my understanding is they can count separately, even if its in the same building. In fact, if you were to go back to (indiscernible), that's the (indiscernible) case where there was a kind of co-op conversion and you had, you know, units owned separately at one point.

But beyond that, you know, there is a fact question about how regulators deal with this, you know, the reasonable expectations about property ownership, these units (indiscernible) and locks, different utility bills, different points of entry, different families occupying them. So you know, we think there's a lot of factual development to be done there.

And then broadly, we need to come back to the off-ramp conversations we're having with defense counsel here about Yee and about the off-ramps, like one of the issues that matters there is the credibility of the defendant's assertions about off-ramps, and we can contest it through discovery, how the government regulators understand those to work, whether they're ever granted, and whether the regulator is consistent with what the law's stated purpose is.

We believe that the 2019 amendment are designed to in fact, ensure that rent stabilized apartments remain stabilized, that's the allegation of paragraph 5 of our complaint, that's one of the focuses of the HSTPA that was adopted last summer. And so it seemed to us that if would be plausible to credit our allegations that the law does what it is set out to do.

So --

THE COURT: I'm sorry, explain that to me? There's factual disputes say, for example, about the reasons why Mr. Panagoulias was denied the personal use of the two-bedroom apartment. We're just assuming at this stage, the truth of every allegation that you make in the complaint and then we're going to make a determination of whether or not it's enough to state a claim, but what would discovery on a subject like that

entail?

Are you entitled to look into, you know, the internal deliberations at the board level? Would next phase of this litigation (indiscernible) the next phase there?

MR. KING: Certainly, your Honor. The next phase of this litigation would add perspective on (indiscernible) and so, yeah, I don't think we'd be entitled to discovery into this dispute that we were involved in eight years ago, which we have a record of now, we've evolved (indiscernible) but we have other instances where we are (indiscernible) have been applied. The defendants argue that there are these off-ramps that people can use, but have they ever been used? Defendants don't think a (indiscernible) has ever been granted.

And moreover, you can take discovery from the employees of the DHCR, one of the defendants here, indicating (indiscernible) apply all these provisions consistent with (indiscernible) that HSPA's purpose is ensuring that rent stabilized apartments remain stabilized. We have internal emails to that effect, (indiscernible) would see that the off-ramps are not credible, and do not exist, in fact. So I think that's what we would find, and there's sure to be more as well.

THE COURT: Okay.

MR. KING: I want to take you back to the regulatory takings, if I could, and talk about, you know, how the 2019 amendments and the changes they make are the straws that break the camel's back, and at the outset of that, confirm, your Honor, your understanding of how our complaint worked.

Just as you said, we challenged the RSL as it was amended last summer and that (indiscernible) a new provision, (indiscernible) the pre-existing provision, and that it was modified, and changed, and as they exist (indiscernible) they've never been tested before.

We challenged the RSL as it exists today, and that's not a sixty-year regime, but a nine-month regime.

THE COURT: But then if they were to agree that the 2019 amendments are that straw, then what does that imply in terms of a remedy?

MR. KING: Then your Honor, it implies what you said during the first argument, which is that the remedy is to remove the last straw, not all straws.

THE COURT: Okay.

MR. KING: So let me talk a little bit about the specific straws that broke the camel's back, and then go into the physical takings claim that is asserted on a facial and an as-applied basis. The key point for our physical takings claims is that under the prior version

of the law, and (indiscernible) in a variety of ways and retained their core property right to use, to possess, and to exclude others from their property.

But the 2019 amendment repealed the provisions (indiscernible) that made that possible, so now owners no longer have the ability to end the tenancy once it begins, and in particular 2019 amendments burdened the right to exclude by repealing the (indiscernible) which we allege our plaintiff used in the past, and which he would use in the future, that's at paragraph 112 to 113 of our complaint.

The 2019 amendment put condo and coop conversion, and not into the hands of the owners, but into the hands of the tenants by requiring 51 percent tenant approval to engage in such a conversion, and the 2019 amendment causes significant changes to the eviction procedures, but your Honor, that goes to the post-breach remedy that we spoke about earlier, allowing the tenant to occupy for up to one year.

And then beyond that, I just want to call out, your Honor, that there's another element in our claim about the eviction process, which is that under the 2019 amendment, a warrant of eviction applies only as to the person named in the warrant, which usually is the (indiscernible) tenant, if you will, and it's not valid

as to anybody else who happens to be present in the apartment, whether they're there lawfully or not, and that's paragraph 146 of the complaint, and page 19 of our opposition brief.

So what that means is as a practical matter, is the eviction process doesn't work and is not available because if show up to evict tenant A, and person B happens to be present, person B has the right to remain, and if you go and you try to evict person B, then person C is present, and so forth.

This is something we will address in our supplemental brief, and so I don't want to belabor the point, so I just want to hit the eviction as an unusual change in 2019.

Moving onto the 2019 third prong of the amendments, the 2019 amendments take away the right of owners to occupy either for their own use, or for family use, every apartment that is a rent-stabilized apartment save one, and so according to Mr. Panagoulias, they've got six rent-stabilized apartments in their building, and they're filled (indiscernible), he can't. There's no off-ramp for the (indiscernible) apartments. And so (indiscernible) becomes a bigger imbalance.

(Indiscernible) if you could, (indiscernible) said get back, (indiscernible) the restrictions are so

numerous that there is no way to do it, and I'll just call out one example. In paragraph 63 to 65, we would say when going to corporate form, as the Wadsworth and the Pinehurst plaintiffs do, they are categorically ineligible for that particular off-ramp.

So (indiscernible) out that (indiscernible) the caveat (indiscernible) but now that the (indiscernible) gone, (indiscernible) the question the Supreme Court was (indiscernible) which is (indiscernible) during Mr. Berg's argument.

You don't have to take it from us. It's the stated purposes for the 2019 amendments to ensure that these rent-stabilized apartments remain stabilized, and it's plausible to say that the law achieves its intended purpose.

A few remarks about the gauntlet. Your Honor, we looked at the gauntlet issue the same way you did during the argument starting off with Mr. Berg about a half-an-hour ago, but to clarify, all of the offerings cited by the defendants would require the proper owner to change in use, and that kind of requirement of a change in use is foreclosed. I will set up (indiscernible) 17, and (indiscernible) where him talking about let them sell the wine, right?

What the Supreme Court said in substance is, if

what it would have to do is avoid a physical taking is to change how the property is used, then that's not an answer on the government's part.

THE COURT: Can we just -- I understand the argument you're making now. Can we just go back to the question of how many off-ramps one needs to avail him or herself of before they can bring an as-applied challenge that's derived a motion to dismiss? Is there any case law -- I'm sure there is case law, that talked about the impact of multiple successful potential off-ramps.

The case we have here is that plaintiffs allege that, look, this is a permanent occupation, defendants respond no, there isn't because there's all these off-ramps, by which the apartment could come out of the rent stabilization regime and you retort, no the Panagoulias' tried one, and it revealed, and discovery will show that that off-ramp is illusory, and the defendant will come back and say, you know, three or four other off-ramps, and plaintiff never tried those. What case law, if any, could you point to that would resolve that question?

MR. KING: Well, I don't know of a case, your Honor, although if I find one, and we'll mention it in the supplemental briefing (indiscernible) there were multiple avenues, and (indiscernible) multiple.

We've been (indiscernible) the case, our

(indiscernible) that case for the following reasons. We have alleged on an as-applied basis that these off-ramps do not exist. They (indiscernible) that there is no (indiscernible) as to the plaintiffs, and because the way the law is structured, and (indiscernible).

THE COURT: (Indiscernible) necessarily likely has (indiscernible) demolished the building and has been denied that option.

MR. KING: Well, your Honor, demolishing the building would not get him back his apartments, and that property is still subject to state law, so (indiscernible). And by the way, demolished (indiscernible) as Mr. Pincus mentioned, you've got to make enormous payment (indiscernible) so I don't think that really is an option.

Mr. Panagoulias has alleged that this is (indiscernible) property is owned such that you could have commercial on the first floor, but not in the rest. You couldn't do it. And even if you could somehow create a business, and occupy the length of the six stabilized units with it, what are you going to do with the other five, right?

So I think the more you look at, and carefully evaluate, these potential off-ramps, the more you see that they do not exist, and certainly we've alleged they

do not exist for our plaintiffs here, and your Honor, just to mention again, the Wadsworth and Pinehurst plaintiffs. They have a corporate form, so the fancy and the personal use exception don't exist.

So the off-ramps (indiscernible) caveat in Yee and Florida Power, and should this case go forward, and our allegations should see the light of the day, and if the defendants are able to provide proof of claims to the contrary, they can go for it.

But (indiscernible) certain about the (indiscernible) could make factual allegations for our plaintiffs, and there are certainly (indiscernible) that include allegations about personal use, but let me just to take you through a few of our other (indiscernible).

So (indiscernible) detail, you know, (indiscernible).

THE COURT: How are you --

MR. KING: Yeah.

THE COURT: -- I don't mean to sort of rush you along, I think where rubber meets the road here is on the is on the as-applied, and regulatory takings challenges, so if you could get to the as-applied sooner than later, then I think that would be helpful.

MR. KING: I will tell you what, I will go through those things now. So on the regulatory takings

as-applied, you know, the allegations is (indiscernible) had said (indiscernible) structure is that, you know, (indiscernible) property (indiscernible) thoughtful, (indiscernible) great case (indiscernible) public (indiscernible) benefit that is provided by our government, that the case (indiscernible). The Penn Central case establishes a multi-factor test, it's not due to the (indiscernible) motion to dismiss, especially (indiscernible) allegation (indiscernible) factual analysis, that depends on a careful inquiry into the specifics of the case. That's on page 1943 of the Supreme Court decision.

The Supreme Court has also taken (indiscernible) case, which is what the Court said in (indiscernible) and motion to dismiss, whether or not the statute has gone too far. As a result, the Court has often rejected motions to dismiss where, as here, plaintiffs make a reasonable showing on at least one of the Penn Central factors (indiscernible) factors (indiscernible) which is 31 and 32 of the brief.

So (indiscernible), your Honor, at a high level. (Indiscernible) allegations as they apply to each of the three Penn Central factors. I guess that would be useful.

THE COURT: It was.

MR. KING: So starting at investment-backed expectations. Our allegations here are that plaintiffs are (indiscernible) unable to recover their investment, including infrastructure updates (indiscernible), and (indiscernible), (indiscernible) Supreme Court raises, and the inability to transition to market rentals, both (indiscernible).

Under the 2019 amendment, IAIs are capped at $15,000 and accruals spread out over 14 or 15 years, depending on how old the building is, the defendant will have the option (indiscernible). This $15,000 cap is so low that they cannot cover upkeep costs, and by the way, the $15,000 is not indexed to inflation, which means that it's going to get lower and lower over time, and since these buildings have been in use, you know, for residential apartments at least since 1974, and in the case of the Panagoulias plaintiffs, since (indiscernible) -- it's old.

So the upkeep costs are substantial. You can't keep the apartments up (indiscernible) which is in paragraph 131 of our complaint.

THE COURT: You say that the $15,000 is recoverable over, I forget how many years, was it 15 years?

MR. KING: 17.

THE COURT: 14, 15 years, (indiscernible) or (indiscernible) of the full amount?

MR. KING: Your Honor, my understanding is that the answer to your question is no, (indiscernible). My understanding is it's a straight line recovery. You take a straight line to invest, and divide it at 160 months or 180 months, and that averages out to (indiscernible).

Moreover, in calculating the amount that you can recover, you have to exclude finance charges, and other costs that are deemed not reasonable by the DHCR, and then finally, there's no (indiscernible) structure on non-paying tenants, which means (indiscernible) available, and if they're (indiscernible) don't pay, (indiscernible). Now, likewise, if you happen to (indiscernible).

On MCI, (indiscernible) the capital cost (indiscernible) intellectual purposes. The (indiscernible) and MCI so states, there is a (indiscernible) between the operating expenses of these plaintiffs, and homeowners generally, and the rates of (indiscernible) and you see that in paragraphs 101 through 104 (indiscernible), correct.

And finally, all of the regulatory burdens posed by the RSL together (indiscernible) don't cover all of the costs (indiscernible) the plaintiffs

(indiscernible), that's paragraphs 106 and 213.

And finally, I'd just like to note, some of these plaintiffs, not all of them, invested in property at the time, and for (indiscernible) at the time and (indiscernible) and out of (indiscernible) expected use of property. That's paragraphs 108 through 113.

All of that together are allegations about investment-backed expectations.

THE COURT: The (indiscernible) (indiscernible) by if we -- if we assume that -- my reading of Penn Central is that we need to show very significant diminution in value of the property, it's necessary but never sufficient element of a regulatory taking, and we have further seen that when looking at that diminution in value, you have to calculate that level of the building that the, you know -- the (indiscernible) rent stabilized apartments in the building, do you get anywhere near, even pre-discovery, the 70-80-90 percent diminution that the case in that Penn Central require? Or is it the case that, you know, (indiscernible) level developing (indiscernible) pattern, (indiscernible) are sufficient?

MR. KING: Your Honor, two responses. My first response will be to respectfully challenge the premise. The Supreme Court made clear in (indiscernible) any sort of requirement or per se rules for Penn Central takings

claims, there's no such thing, as I understand it, and a necessary condition for a Penn Central taking (indiscernible) general (indiscernible) property rights (indiscernible), but how far is too far is dependent in every case on a careful examination on the (indiscernible) stronger (indiscernible) factor and (indiscernible) showing on one another.

THE COURT: So if -- my understanding, okay, (indiscernible) looked what was actually held to be a regulatory taking, you know, I don't see anything like an equivalent to what you see in regulatory or physical takings where you've got something that's relatively de minimis because it's (indiscernible) on the other Penn Central factors, gives rise to regulatory takings. Am I missing a case there, or is that a relatively small diminution in value in the overall scheme of things is nonetheless, combined with other factors, sufficient to lead to a Penn Central taking?

MR. KING: Well, your Honor, the case that comes to my mind, and I'll admit it's a little unclear which bucket this case falls into (indiscernible) whereas the private (indiscernible) made it public, and the Court -- the Supreme Court (indiscernible) in examining regulatory takings focused on physical inclusion, that we (indiscernible) in looking to Penn Central factors at

least in part. I'll talk about that (indiscernible) in supplemental briefing.

That's one example, I believe, where it was a sort of Penn Central analysis that involved, you know, this more sort of (indiscernible) diminution of value. Even accepting that there were some sort of necessary diminution in value, my expectation is that discovery would show very significant diminution in value as a result of the 2019 amendment and the laws that exist today.

THE COURT: I'm not sure this (indiscernible) understand you allege to be the -- has a diminution in value for Penn Central purposes, including the allegation of (indiscernible).

MR. KING: I know that there was a way for (indiscernible) significant difference in value between regulated and stabilized apartments, and then, you know in essence (indiscernible) and beyond that, you have the allegation of a 20 to 40 percent reduction in value of (indiscernible).

THE COURT: So I'm looking at the as-applied context here.

MR. KING: Oh.

THE COURT: The (indiscernible), I think you said we suffer the full diminution in value from all rent

regulation going back to 1969 or for some plaintiffs --

MR. KING: Right.

THE COURT: -- or long before that, but so you know if you can, explain -- the particular plaintiff with the particular as-applied claim, the largest diminution in value, and -- and how you get there and explain again what you're alleging in terms of numbers?

MR. KING: Certainly, your Honor. So the (indiscernible) I have owned since approximately 1950, based off the diminution in value, is based off of the RSL as a whole, not this 2019 amendment (indiscernible) but the diminution from the RSL's (indiscernible) property (indiscernible), and so that (indiscernible).

We (indiscernible) in 1974, so they would be (indiscernible) relatively, not just (indiscernible) or RSL regulation. So I don't know that (indiscernible) go to on this particular issue.

The Wadsworth and Pinehurst plaintiffs obtained their buildings in 2000, and so the analysis would be different, right? And so your Honor (indiscernible) expectations that shift in part on the laws that exist when you acquire property.

You know (indiscernible) says that (indiscernible) (indiscernible) color on that. I think that (indiscernible) a significant diminution in value.

THE COURT: Okay, and then what does that mean in terms of what you are alleging (indiscernible)?

MR. KING: I think it means, you know, we're alleging something in excess of (indiscernible) percent. It was (indiscernible) percent as a result of 2019 and it will be a larger number when you add to that the diminution of value that came before from the RSL (indiscernible). You're here today, your Honor, (indiscernible). You can understand that it's been (indiscernible) in excess of (indiscernible) percent.

THE COURT: Okay.

MR. KING: We can come back to the rest of the Penn Central factors and acknowledge, you've got to look at everything together. In terms of the (indiscernible) physical occupation that we talked about earlier, and (indiscernible) left out, you know, the transfer of rights. The 2019 amendment (indiscernible) over to tenants (indiscernible) an inability of owners to obtain use of their property once the tenancy is in place.

And then we explain about the economic effect and the fact that (indiscernible) with operating costs --

THE COURT: Can you -- so I understand when Penn Central talks about (indiscernible), tell me if I'm understanding this correctly, I think it would have to be understood to mean something, you know, other than

financial expectation because then you have lost me (indiscernible) overlap (indiscernible) and so these kinds of expectations that give rise to a claim of interference are things like with are (indiscernible) property, and (indiscernible) the highest and best use of the property was actually (indiscernible) that I can't use it for X anymore.

Am I understanding that fact correctly to say that, and that you allege specifically about interference with your clients' impact and expectations.

MR. KING: Well your Honor again, I think I challenge the premise of what you just said, not, but you know, the Supreme Court (indiscernible) expectations reference to the investment (indiscernible) necessarily (indiscernible) person has conducted the (indiscernible) but that's certainly part of the analysis.

THE COURT: And (indiscernible) case there is discussion, you know, about (indiscernible) diminution in value to be measured as a value of your investment, but as a diminution in, you know, your return. They are kind of the same thing, right, in that one leads to the other?

MR. KING: We'll make economic impact (indiscernible) investment expectation of profit and analysis overlap with one another, for lack of a (indiscernible) expectations, and (indiscernible) are

some significant expectation would be non-economic (indiscernible), but what your question went to, you know, I'm a plaintiff who's living here, and I want to be able to put my sister in the unit next door, and (indiscernible) through college I want to put her upstairs in unit C, and so those are the kinds of interferences we allege here, and including plaintiffs, that that was exactly what we said in, I believe, paragraphs 63 and 64 of the complaint.

So you know, that's one type of a non-economic (indiscernible) --

THE COURT: Well, isn't (indiscernible) expectations at the time the investment was made, and do you allege -- do you allege that when parents bought the building they were intending to put their future son and daughter into these apartments? How does that work?

MR. KING: You know, that's not addressed specifically in the complaint, what the complaint, your Honor, said is that plaintiff Panagoulias grew up in this building and he continues to live there, and his sister remained interested in living there if she could, to be close to the family. So I think there's a lot there that (indiscernible) who (indiscernible) identical allegations include the specific (indiscernible) to get through (indiscernible).

Then if you put it all together, there's a thoughtful allegation here, that's borne out in the brief, that's something the plaintiffs (indiscernible) and I think that's something they have been asking for.

So (indiscernible) that's (indiscernible), you know, prong of the Penn Central test (indiscernible) again, look at the practical effects on the plaintiffs here (indiscernible) to you, and (indiscernible) if you operate this building and you own it together with your parents. What can you do to get those stabilized apartments back so that you can use them yourself (indiscernible) and the answer is you can't. Under the RSL, as amended in 2019, there is nothing you guys can do to regain four elements (indiscernible) of the (indiscernible) saying here. That's why (indiscernible). That's (indiscernible).

THE COURT: The State and the City says you can wait for a vacancy, and that you can (indiscernible) for personal use.

MR. KING: Two responses to that, your Honor, the first is you can wait for a vacancy (indiscernible) tend to go on for decades, and whether there is a vacancy is one hundred percent in the tenant's control and zero percent in the owner's control.

Second, at most, you can get one of your

apartments back that way if you don't hold a corporate form after all (indiscernible) the right is (indiscernible), as the Court pointed out.

So I think you can (indiscernible) offering happened to be.

THE COURT: Okay. And anything else before you turn onto the defendants?

MR. KING: I realize that we're a little over time, if you give me a little bit of (indiscernible) and contract clause.

THE COURT: Yes, (indiscernible).

MR. KING: And that's sort of (indiscernible).

Yes, your Honor, that's sort of (indiscernible) less than five minutes. Due process, you know, (indiscernible) whether or not the law served its purposes in (indiscernible), so I am not going to retread that territory.

But what I will say is (indiscernible) plaintiff has which is this. The trigger for initiating for rent stabilization is a finding that the vacancy rate is not in excess of five percent. What we've alleged in paragraphs 169 to 170 of our complaint, is that the RSL and its restrictions (indiscernible) caused the vacancy rate to go below five percent, and that interaction (indiscernible) because what we explain is the very

emergency the RSL purports to address, it's causing that emergency. So it's a perpetuating cycle, and that's irrational (indiscernible) onto page 5 where the City says there's a 15 percent vacancy rate for rent-stabilized units (indiscernible). If the problem is low vacancy rates (indiscernible) also (indiscernible) solution, and not only that but let's go back to (indiscernible) rent stabilization law is that there is (indiscernible).

The defendant dismissed (indiscernible) made no effort to show that the RSL as amended serves that purpose and indeed it does not.

THE COURT: And you just show, you know, for (indiscernible) purposes of this conversation, that I agree there's a disputed fact on what I will call the equipment (indiscernible) that rent stabilization may work contrary to the goal of easing housing shortages, but you know, I think it's also the case, we all agree, that that's not the only (indiscernible) asserted as (indiscernible) the extent to which other justifications like neighborhood stability and continuity have been held to be valid purposes. Is that -- can -- and assuming that they are, isn't it clearly the case that there are at least some people who (indiscernible) facial challenge, who are attributing, you know, critical

(indiscernible) of New York City as, you know, (indiscernible) has teachers, or firefighters, or whatever else, who can live here only because they reside in rent-stabilized units and that would be some impact at least, (indiscernible) some impact on the (indiscernible), you know, were those apartment no longer to be rent-stabilized?

MR. KING: It may be, your Honor, that the evidence would show that, (indiscernible) evidence that I believe is to the contrary, and that -- to me that's a fact question and maybe the defendants are right about all of that, but this is the kind of fact issue that gets borne out not on a motion to dismiss but on a motion for summary judgment.

I think so -- second of all, your Honor, just one other point, (indiscernible) consideration of things like neighborhood stability after you get to that five percent trigger, and that five percent trigger and I'm consolidated law (indiscernible) for that standing, and we think that that threshold is irrational.

I (indiscernible) factual law passes for decades didn't have that threshold, and in that time rent stabilization (indiscernible). (Indiscernible).

THE COURT: Okay.

MR. KING: I'm sure there's more we can discuss

on the due process, but if I could, let me turn to contract clause, which is covered only in this case, not in the CHIP case.

You're exactly right, our complaint alleges two different claims here. One claim is a broad claim that applies to all our plaintiffs, and the other is specific to plaintiff Pinehurst. ,The argument was made that we did not include the (indiscernible) claim -- excuse me, (indiscernible) claim is not correct, (indiscernible) that would be the broad claim there, and (indiscernible) complaint (indiscernible) preferential rent agreements that are going to be forced to continue under the 2019 amendments.

And in our allegations in that regard --

(Cross-talk)

THE COURT: That's (indiscernible) more broader point than that, that it's only a subset of the plaintiffs who actually had a contract to recapture some of the preferential rent where the contract was executed prior to the effective date of the 2019 amendment, and the contract which was supposed to be (indiscernible) after that is now is invalidated, Is that a fair understanding?

MR. KING: Close, your Honor, and let me see if I can clarify. I should say it's (indiscernible) claim

which is that (indiscernible) to be (indiscernible). To add to the broader claim, our allegation is, you know, to the plaintiffs' side, is that what the legislature did with the 2019 amendment was that it stripped the end date of the price term off of all the existing contracts. So we, you know, on June 1st, 2019, before the (indiscernible) was enacted, we -- all our plaintiffs had contracts that allowed us to increase the rent going forward, and the legislature said, nope, there's no end date on that contract, at least as to the price term, and it's stripped off, and so that's the broader claim.

And the defendants have their argument that, I would cite to Buffalo Teachers, which by the way is a summary judgment case, not a motion to dismiss case, which is positive for us on the substantial impairment point, and so now you have to deal with the other two prongs: whether the law serves a significant public purpose, and whether the law was really tailored to that purpose, and (indiscernible) motion brief (indiscernible) on summary judgment. So that's what I have to say about the broad claim.

On the narrow claim, you know, just on (indiscernible) contracts that 74 Pinehurst signed before the 2019 amendments were enacted, that called for rent that now can't be charged. Basically the 2019 amendments

did was that it forced the parties to adopt a price term that no one bargained for or agreed to.

And as Mr. Berg conceded, that gets us into -- unquestionably, gets us into the contract clause analysis, the same point would apply on substantial impairment per Buffalo Teachers, where the Court said that even a minor effect on, you know, having a relatively minimal economic impact, nevertheless, when you're dealing with price terms that that's substantial impairment. And so once again you're bound to the tailoring analysis.

So that's I would say about all of that. I'd like to make a point your Honor on the structure of the decisions, you know, we're not seeking formal consolidation here the significance of (indiscernible) plaintiffs who are making the claims in CHIP with our plaintiffs (indiscernible) it would be sensible in our view to dispose of the cases in a single opinion.

And in fact, one of our plaintiffs, 177 Wadsworth, brings only facial challenges, which means there may be a reason (indiscernible) plaintiff to be in the same judgment as CHIP (indiscernible) plaintiffs (indiscernible) as-applied claims that have been dealt with.

And a final point, Mr. Mr. Berg asserted this

morning that neither of today's cases made challenges to the real property law, the RPAPL, and that's just not the case. We've challenged all parts of the RPAPL, if you look at paragraphs 90, 91, 94, 124, and 128 of our complaint, you'll see we challenge among other things, the condo co-op provisions and the eviction provisions.

With all of that, your Honor, we would submit that the motion to dismiss should be denied.

THE COURT: All right. Mr. King.

All right, I will turn it back over to the defendants. I'll give you more time than those ten minutes we reserved given that we've heard from the plaintiffs, for more time than they were expected to speak. And all of this, I should say, has been very helpful from all parties. I do think it's time well spent.

Mr. Berg, before we turn back to you, I just urge all of the defendants, and once it's their turn to wrap up, to speak only to issues that came up in connection with the plaintiffs' argument, rather than ranging beyond that scope.

MR. BERG: Okay. Thank you, your Honor, Michael Berg.

I actually think I can be fairly brief in rebuttal with (indiscernible) characterize

(indiscernible) Pinehurst (indiscernible) to discussing the (indiscernible). I understand that to the extent the plaintiffs are seeking to challenge the (indiscernible) provisions of law that are set up by the defendant and they clearly are (indiscernible) level.

I want to touch on the point of the contract clause claim that the law somehow alters the price terms, to inflate the price terms of contracts going forward, again, it does not (indiscernible) contract clause (indiscernible) because it not affecting the prior contract, it's affecting the future contracts.

More factually, there is (indiscernible) of the (indiscernible) term of the contract. Contracts (indiscernible) contracts (indiscernible) and certain circumstances (indiscernible) by the statute, (indiscernible).

The percentage of -- the (indiscernible) rent is charged in these contracts, (indiscernible) increased by the guidelines for (indiscernible) percentages of (indiscernible) increases for capital improvement and the other increases authorized by law. So it's really not the case that the case that the 2019 amendment not existing contracts. (Indiscernible) contracts (indiscernible) which (indiscernible) reaches their conclusion.

With regard to the so-called illusory off-ramps, I just want to refer back to (indiscernible) that the provision of law (indiscernible) illusory, and in particular, plaintiff (indiscernible) on a particular occasion is denied a lease under that provision. (Indiscernible) allegations (indiscernible) probably denied a lease under the owner's lease exception in rent stabilization.

So if I understand that plaintiffs want to (indiscernible) and hold without (indiscernible) to rent stabilization. Indeed they argue to the contrary, so I just want to make sure that the Court is not (indiscernible) because property owner X lost a claim to the DHCR, that means that that theory of injury for all (indiscernible).

THE COURT: So we're not deciding whether the off-ramp is illusory. We're deciding only whether the plaintiff has made out sufficient allegations that it's illusory, for that to factor into the question of whether it survives a motion to dismiss, and they've alleged, you know, A, they denied my application for reasons that made no sense, I needed a two-bedroom for my extended family, and they denied the application on the theory they could've -- in a year prior applied for personal use of a one-bedroom. You know, that then supports the

allegation, you know, taken together with the comment from legislators that Mr. King cited, and from the DHCR, the fact that the owners keep every apartment possible in the system, and make sure that New York City loses as little rent-stabilized apartment stock as possible, taking those things together, would you conclude that the off-ramps are not everything they're cracked up to be, simply for purposes of a motion to dismiss.

MR. BERG: And (indiscernible) know, your Honor, I think the (indiscernible).

THE COURT: Why is that not a question of fact? You say they're real, they say they're not. Look, what happens is that the Court can't conclude one way or the other at this stage.

MR. BERG: Well, the plaintiff said that to (indiscernible) -- I think it was that the fact that (indiscernible) apartments (indiscernible) for personal use (indiscernible) necessity, does not state a claim. I guess (indiscernible) and I think they witnessed this.

THE COURT: Sorry, say that again?

MR. BERG: I think it's in the Harmon case, but I would have to double-check that. And (indiscernible) part of the (indiscernible) trying to be (indiscernible) standard. It is not (indiscernible) evidence if you don't state a claim (indiscernible) because

(indiscernible) my application for (indiscernible) residence (indiscernible) because I lost my application to evict a rent-stabilized tenant, that I suffered a credible constitutional injury.

Again, as Ms. Moston pointed out, that depends upon a vacancy, and (indiscernible) and (indiscernible) had therefore -- well, I will leave it at that, your Honor. I will (indiscernible). I appreciate (indiscernible).

I want to (indiscernible) and say that the legislature relied (indiscernible) had to be in 1974, after the initial (indiscernible), the legislature relied on data showing that (indiscernible) with rent-stabilized (indiscernible) and without having adverse effects on the (indiscernible) and its neighborhood and tenants, and socioeconomic diversity. And that is a -- and so, for the legislature to recognize that, (indiscernible) --

THE COURT: You're breaking up (indiscernible) here.

MR. BERG: Sorry, your Honor. For the legislature to say, we have lost a lot of rent-stabilized units and we need to slow those losses, you need a different legislative line drawn than you did in 1993 and 1997. We need to draw up a line now in a way that encourages more tenants to stay in their homes, and

discourage owners from taking actions that, while completely lawful, to have the effect of bribing tenants out of their units.

THE COURT: I understand. No need to argue that the legislature can have it both ways, in that on the one hand, they're saying look, we're going to require you to offer the low market leases to not only our tenants but their successors potentially in perpetuity, don't worry, that's not a taking because there are all of these off-ramps in the statute, and then say at the same time, saying you know we need to do everything we can to close off those off-ramps because we can't lose rent-stabilized --

MR. BERG: Well, that --

THE COURT: I think that's the point that they're making. They're finding out if it's illusory or not, and you have to consider that as it relates to, you know, the question of how permanent, and how physical this alleged taking might be.

MR. BERG: Right, and I think that's -- I think that's an accurate description, your Honor. We are not arguing that in this case, the legislature committed to (indiscernible) occupants as permanent occupancy rent stabilized units. The argument is that the legislature drew the line on the tenant back in (indiscernible), they

have valid reason for doing so, and adopts reasonable measures to achieve the goals that the plaintiffs (indiscernible) proceeding indicated at that time.

I haven't (indiscernible). The five percent (indiscernible) line drawn, and with those written arguments by plaintiffs, I think (indiscernible) five percent cutoff that has (indiscernible) four-and-a-half to five percent (indiscernible) a constitutional right, and call it (indiscernible), in addition to the five percent threshold, needs to be (indiscernible) by City counsel with (indiscernible).

That's all I have to say from (indiscernible) plaintiffs, your Honor.

There is one other important (indiscernible).

THE COURT: I lost you for a second there again.

MR. BERG: Sorry, your Honor. There is (indiscernible) don't want to (indiscernible). With the recent (indiscernible) other cases, we made an argument that certain claims against the State would be brought (indiscernible) sovereign immunity. That is not an argument that we make in our papers in this case, and (indiscernible) jurisdictional matter, so (indiscernible) can at any time.

I just want to flag it because the

(indiscernible) plaintiffs (indiscernible) and see if there's something we can do to address that concern before raising it with the Court. It would have no effect on plaintiffs' claim relief, against Commissioner Visnauskas in her official capacity for injunctive relief, the declaratory relief going forward.

So it's not going to affect the substance of the allegations, I'd just like to have a conversation with plaintiffs' counsel offline about the other (indiscernible) and DHCR proper second (indiscernible) and report back to your Honor as to whether we reach a resolution on that.

THE COURT: Yes, certainly if you all agree on that, that would be preferable to not have everybody brief the issue, and then you just tell me you agree with each other's briefs, so please do have that conversation and if you don't see eye-to-eye on it, we will cross that bridge when we come to it.

Before I call on another defense counsel, can I just ask you to clarify for me distinctly between exactly what happened between 1969 and 1974? I'm a little unclear on that part of the history here.

MR. BERG: Yes, your Honor. I will do my best.

THE COURT: (Indiscernible) the start of rent regulation in New York, the start of that

(indiscernible).

MR. BERG: It's 1969.

THE COURT: Okay.

MR. BERG: It's my understanding that there was some legislation passed by the legislature in (indiscernible). Pursuant to that (indiscernible) regulation, in 1969, when the New York City Council adopted the original rent stabilization law.

I don't know when the regulations pursuant to that law were adopted. In 1974, the state legislature essentially readopted rent stabilization law by adopting an Emergency Tenant Protection Act or ETPA, which (indiscernible).

That -- that (indiscernible) between and described it, I don't know if it (indiscernible) factual and procedural history, and I believe in 1971, there had been attempts to renew (indiscernible) from rent stabilization law (indiscernible), and for a number of reasons for that, for example, there was the thought that it might encourage new housing construction.

What happened was that an awfully large number, in the eyes of the state legislature and (indiscernible) large number, I believe one hundred thousand plus apartments were permanently regulated as a result of that, and at the same time, they did not see the increase

in new construction for the other benefit that the tenants had hoped for.

In 1974, rent stabilization (indiscernible) simply adopted by the state legislature in an effort to respond, but also reimposed it in New York, the City Council in Nassau, Rockland and Westchester Counties, and made it a matter of state law, rather than a matter of city law, (indiscernible) administrative (indiscernible).

THE COURT: That's (indiscernible) of it, Mr. Berg, your command of it. So thank you very much, that's helpful. All right.

MR. BERG: Thank you.

THE COURT: Ms. Moston, do you have anything (indiscernible) brief for the City?

MS. MOSTON: Sure. This is Rachel Moston, just a few very brief points.

To respond to the question again came up this morning about (indiscernible) discovery, and whether or not the RSL is effective, we are (indiscernible) affected, I just want to reiterate this is exactly what the Supreme Court cautioned against in Lingle. Now these laws (indiscernible) rent controlled (indiscernible) is (indiscernible) fact finding (indiscernible) and the Supreme Court said it's (indiscernible).

The City (indiscernible) is from the New York

Court of Appeals, the exact argument was raised by the plaintiffs in that case. The plaintiffs' RSA action (indiscernible), (indiscernible) decision.

The owner (indiscernible) that rent regulation perpetuates (indiscernible) housing shortage for New York City. This is not a new claim. These arguments raised here by the plaintiff have been going around for a long time, and the New York Court of Appeals said that's not a question for us, that is a question for the legislature.

It will (indiscernible) the Governor (indiscernible) about the efficacy and (indiscernible) housing policy and economic theory. We requested (indiscernible) legislature. It's not clear (indiscernible) fact finding on a rational basis review. I'm not saying that (indiscernible) is a view, while we're (indiscernible) the RSL (indiscernible) 2019 (indiscernible).

The other thing that I just want to briefly touch on briefly is --

THE COURT: I'm confused. Can you (indiscernible) --

MS. MOSTON: Sure.

THE COURT: -- cases that say look, the legislature articulated the multiple jurisdiction, the multiple (indiscernible), multiple justifications of the

law, and there's potentially an open question under one that comes under rational basis review that there's no real dispute of fact under (indiscernible) 2, 3 or 4? That would be helpful (indiscernible).

MS. MOSTON: Absolutely. Yes, the denominator that we were talking about it, and I think the case law (indiscernible) issue of fact or law, I just wanted to point out that the Second -- Second Circuit (indiscernible) --

THE COURT: I think I lost you there.

MS. MOSTON: Sorry. I will (indiscernible) real quick. The Second Circuit (indiscernible) Greystone case and (indiscernible) restrictions that (indiscernible) but the Court clearly said. So both of those programs (indiscernible). We need to (indiscernible) on that issue.

Those (indiscernible) the off-ramps, I just wanted to (indiscernible) on what Mr. Berg was saying, that the Second Circuit (indiscernible) exit ramp from the rent stabilization laws.

According to (indiscernible) the individual plaintiffs (indiscernible) and the Court says no, there's no physical taking, you have the opportunity to exercise three exit strategies, or (indiscernible) and so (indiscernible) building (indiscernible) satisfactory

(indiscernible).

But if you have a off-ramps, adopting (indiscernible) but the Second Circuit talks about (indiscernible) of that, (indiscernible) and (indiscernible).

THE COURT: Okay. Did the --

MS. MOSTON: (Indiscernible).

THE COURT: -- City require a plaintiff to avail themselves of multiple -- because that's what I thought we heard varying things on the question of, you know, how many off-ramps was one required to test before we can say, with their best off-ramps they're illusory as to us and offer an as-applied challenge?

MS. MOSTON: It is (indiscernible) with respect to the plaintiff there is no physical taking.

THE COURT: Okay.

MS. MOSTON: Now with (indiscernible).

THE COURT: Yeah, now (indiscernible) question (indiscernible) resolution from the Second Circuit and (indiscernible) but we will take a look. All right. Thank you very much.

And Mr. Duke, anything (indiscernible) yourself?

MR. DUKE: Yes, your Honor, just a few brief points, with respect to the off-ramps, I guess there's

been a lot of air play today, and it -- I believe that their allegations concerning the off-ramps hardly matter at all here, because no plaintiff is asserted to have alleged they want to take advantage of an off-ramp. If they decide that they no longer want to rent to tenants, if they (indiscernible) of them. In their (indiscernible) off-ramps, they have not brought an as-applied challenge here.

THE COURT: (Indiscernible) this.

MR. DUKE: Panagoulias (indiscernible).

THE COURT: Look through the motion papers, you know, the off-ramps are an important factor, right? You've essentially got plaintiffs saying look, the State have essentially commandeered rental housing that I own, requiring that I offer it at below market rates in perpetuity essentially to not only the current tenants, but also their successors, and (indiscernible) and the reason I think (indiscernible) that that's held out to be a taking (indiscernible) but other taking cases, is that there are (indiscernible) the system and (indiscernible) here, you had luxury decontrol and vacancy decontrol, and those happened significant in 2019, you had personal use, that was capped as of 2019, and you have the Panagoulias' alleging their as-applied challenge that, you know, (a) I had the expectation of luxury and vacancy decontrol and

that's gone now and (b) I actually tried to avail myself of the personal use exemption, and my application was denied for irrational reasons.

So I don't understand why you're saying that's not at issue here.

MR. DUKE: Right, your Honor, because with respect to specifically the high rent, and high income individual rent control, I don't (indiscernible). (Indiscernible) state if they want -- if they deregulate an apartment, their high rent, high income control, which I could point out didn't even exist until 1993, with the prior (indiscernible) the RSL, did not have that option (indiscernible).

The (indiscernible) grant it so that the exit means the richer tenants or the same tenants have a heavier burden (indiscernible), very specific (indiscernible).

And with respect to the Panagoulias', they wanted to take over one unit, eight years ago. They don't want just one unit now, if they want to do it now, they can, they're more than welcome to use the guidelines. The tenant law claims (indiscernible), there are four units vacant that they can take over, that they can evict those tenants at the end of the lease because they're not regulated units, and if they do that, then

there would still be the same exact amount of people occupying the property, than if they took over one of the rent regulated units. And Yee makes it very clear that he cannot pick and choose what type of people he has coming into the property. Particularly, I want rent regulated people (indiscernible) in my properties, it just says I want not rent regulated people. It's not something that the Supreme Court allows. It's not (indiscernible), your Honor.

The second point is that with respect to the as-applied regulatory takings claim, in my view, the plaintiffs are trying to profit as much as they would in a market-based system, the plaintiffs alleges (indiscernible) rent roll, regulated rents, they cannot charge rent sufficient to make a profit to cover their operating costs.

That they found that sufficient to reject a regulatory takings claim, and to be sure that there are -- FHL and (indiscernible) as-applied claims involving a building that had been converted to a co-op and there was a default (indiscernible) under the law.

THE COURT: (Indiscernible).

MR. DUKE: Correct. So in that case, they're still allowed to collect regulated rents, and so I think FHL still gives (indiscernible) clear and it shows that

they're not going to collect as much, and that that is not enough. That is not enough, your Honor.

And then the last point I'd like to address is that -- and I think Ms. Moston touched on this a little bit, she was breaking up, so I just wanted to make sure that this point is made clear because it's important, I heard plaintiffs' counsel say that they allege that the default, and that (indiscernible) and that they need a record in order to determine what their -- the law does mean to them, otherwise it's got to fall on rational basis review.

And the Second Circuit has been abundantly clear on this, and I quote, "It did not strike down the law as irrational simply because it may not succeed in bringing about the results it seeks to accomplish, because the wrongs it addresses could be redressed some other way, but because the statute's (indiscernible). The (indiscernible) will be returned on the basis of no empirical evidence support the assumption underlying the legislature choice."

The Supreme Court said this is an (indiscernible) communication that properly (indiscernible) which stated that a legislative board was not subject to fact finding, and may be based on rational speculation unsupported by evidence under

(indiscernible), and (indiscernible).

There the district court was required to choose between the appropriate comments that rent controlled statutes that would help to prevent concentration (indiscernible) in the face of (indiscernible) retail market. The Court found (indiscernible) more persuasive than the other, and included that the (indiscernible) legislature -- the (indiscernible) legislature had chosen (indiscernible) not actually achieved its objectives.

The Supreme Court, and I quote said, "these kinds of proceedings were remarkable to say the least. The (indiscernible) given that we have long-eschewed such heightened scrutiny in addressing the substantive due process challenges to government regulations. The reason for (indiscernible) legislative judgments about the need for (indiscernible) and effectiveness of regulatory actions are by now well-established and we think are no less applicable here."

That's all I have, your Honor. I you have any further questions, I'll be happy to answer them.

THE COURT: Thank you.

All right, Mr. King?

MR. KING: Thank you, your Honor. I'll be brief. I have four straight points to make (indiscernible).

The first is that as Mr. Duke was just arguing, and that as some of the defendants brought out in their rebuttals, they're really arguing the merits, and not the plausibility of our allegations, and in just one example, Ms. Moston referred to the Greystone case in which in 1999, was very specific about the (indiscernible) language that might be (indiscernible) but the Supreme Court said that (indiscernible) decision in June of 2017, and it specifically said there that every case needs to be taken on its own individual merits.

What (indiscernible) our analysis in Greystone (indiscernible) going to be trickier, and it's going to require careful attention to the individual facts that our plaintiffs have applied.

Number two, Mr. Berg mentioned the (indiscernible) issue about (indiscernible) allegations (indiscernible) gone through, you know, a round of briefing and many hours of argument about. I'll be glad to discuss it with him and will be prepared to report back to the Court on that point.

Number three, (indiscernible) comments about the Harmon case. You know, Harmon is fundamentally different for three reasons. And Mr. Pincus touched on this, but let me be clear, first off, the RSL works in a fundamentally different way today than it did in 2011

when the Second Circuit dealt with it - and that goes to all the changes, the straws we allege broke the camel's back, but beyond that, the plaintiff in that case bought into the version of the RSL that he challenged, not so as to our plaintiffs here, at least as to the Panagoulias' and (indiscernible).

And the third thing is, and I think the most important thing, the Second Circuit in Harmon did not address the (indiscernible) which says that when a law compelled the owner to bring (indiscernible) that could result in physical taking, and you know, because the Court didn't engage on that point, and I really don't know how much it tells us here.

Fourth, and finally, the Supreme Court has said in the realm of takings, that there is a line that there are laws that go too far. The 2019 Amendments, even according to their own sponsors, are unprecedented, and excluded changes from the (indiscernible) come before them. We reserve here and show that those laws and the methods crossed that line, and that's what summary judgment is for, and we therefore submit that the motion to dismiss should be denied.

Unless your Honor has further questions, (indiscernible) that.

THE COURT: All right. So I have failed

miserably at my effort to bringing this in at an hour-and-a-half or so, but again, with good reasons because this is a very complicated set of constitutional, legal, and factual issues that regulate us here. This has been extremely helpful to me in terms of positiveness and informing my thinking, and so again, I'm grateful for the briefing by all of you.

Recently, (indiscernible) submit that the quality of the advocacy that we've heard today, as well as these are very important issues, so (indiscernible). So I will look forward to the supplemental briefing. We've discussed here the same schedule that we articulated this morning should apply here as well, and the parties (indiscernible) arguments in both cases, and (indiscernible) can do that in one submission, rather than do separate ones.

With that --

MR. BERG: Your Honor, this is Michael Berg for the (indiscernible).

If I could have a moment or two to discuss (indiscernible). What are the specific issues that the Court wants supplemental briefing on in this case?

THE COURT: So the only thing that's new to this case, was the one that Mr. King articulated, and (indiscernible) relying on Mr. King on that -- well, it's

the question of the denominator issue, I think that we were talking about the possibility of you submitting supplemental briefing on.

MR. BERG: Yes. We certainly could do that, your Honor, but where I made expressly the request for on Nordlinger, on obviously, whether particular interests were valid for these purposes. That would be in addition to, or on top of the two you identified this morning, the first of which is the post-breach remedies, the second of which is this idea of applying and weighing the Supreme Court authority.

THE COURT: Okay.

UNIDENTIFIED SPEAKER: Your Honor?

THE COURT: I'll give Mr. King for plaintiffs until next Friday, and ten pages -- not ten letter pages of single-spaced text, but ten pages as a brief, and give each of the defendants or the defendant in both cases an extra eight pages on top of the ten we talked about this morning, given that you may be responding to additional arguments as well.

So ten pages from the plaintiffs in this morning's case, and the plaintiffs here, for a total of 20, and then -- why don't we do actually 16 pages each from defendants for the City, State, and intervenors, for a total of 48 pages from the defendants?

MR. KING: Your Honor, this is Kevin King for the plaintiffs in this case.

Are you saying that the plaintiffs should file their supplemental briefs first on Friday, let's see, July 3rd, and the defendants would submit by (indiscernible) motion (indiscernible) the first week or second?

THE COURT: Yeah, that's fine with me. Yeah. I don't want to set a whole additional briefing schedule here. We had set it up that way this morning because I think the issue that we're anticipating supplemental briefing on, were mostly issues being requested by the plaintiffs, and I think that may be true here as well. So, you know, why don't we hold the schedule as we (indiscernible) as.

Let me refer to (indiscernible) equalize, and I'm thinking out loud as I go here, in an effort to equalize the page limits in the aggregate for both sides, Mr. King should take 15 pages each, and then the plaintiffs can have 16 pages for each of their three submissions.

MR. KING: This is Mr. King for the plaintiffs. I think that process makes sense to us, and works for us.

THE COURT: All right.

MR. BERG: Your Honor, this is Michael Berg.

(Indiscernible) dates that you're looking for it?

THE COURT: Yeah, the plaintiffs should submit by a week from Friday.

THE CLERK: Judge, I'm sorry, this is Alicia. I just want to say that next Friday is actually July 3rd, and --

THE COURT: Holiday.

THE CLERK: Yes, because July 4th is on a Saturday. Do you want to move that July 6th?

THE COURT: I don't want to ruin anyone's July 4th weekend, and so it makes sense to move that to July 10th for the plaintiffs, and July 17th for the defendants' response.

It's hard for me to tell these days how holidays are different from nonholidays and weekdays from weekends, but someone on the phone may have better July 4th plans than I do, so let's fix the deadline accordingly.

All right. With that, I think we settled it. Again, thanks everybody for the time, and we will be in touch.

IN UNISON: Thank you, your Honor.

THE COURT: Take care.

(Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this **21st** day of **August**, 2020.

Linda Ferrara

Linda Ferrara

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